Lukman bin Zainuddin v Public Prosecutor

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HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42SA-260 OF 2010
NURCHAYA ARSHAD J
18 SEPTEMBER 2012

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Criminal Law — Abetment — By intentional aiding — Penal Code s 414 — Alternative charge under s 109 read together with s 414 of the Penal Code — Charged and convicted on principal charge — Whether time of offence proven — Whether there were material contradiction between evidence of witness — Whether safe to convict appellant on evidence of accomplice — Ownership of car — Whether sentence meted out proportionate to offence

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The appellant, a legal officer at the attorney general's chambers, was charged under s 414 of the Penal Code ('Code') for the offence of assisting in concealment of a stolen car. Alternatively, he was charged under s 109 read together with s 414 of the same Code. The appellant was later charged and convicted on the principal charge. He was sentenced to 12 months imprisonment, and a fine of RM2,000 in default three months imprisonment. In the present appeal, the appellant contended that the time of the offence was not proven; and there were material contradiction between evidence of the witness, in particular SP5 and SP7. The other issues raised before the court were whether it was safe to convict the appellant based on the evidence of SP5, an accomplice; whether the ownership of the car belongs to SP8 and whether the sentence meted out was proportionate to the offence.

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Held, dismissing the appeal:

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(1) The appellant claimed that according to the amended charge, the time of the offence was from 24 March 2006 (11pm) until 25 March 2006 (12.15am) but no evidence was adduced to prove that an offence actually took place at the particular time and date. The court was satisfied with the written submission of the learned deputy public prosecutor that it was a bona fide typo error. Furthermore, SP5's evidence clearly showed that an offence actually took place on 24 May 2006 (11pm) until 25 June 2006 (12.15am). The typo error could be cured via s 422 of the Criminal Procedure Code. The appellant had not at all be prejudiced or suffered any injustice (see paras 8–10 & 12).

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(2) To determine whether there were real contradictions among witnesses, the totality of the evidence had to be examined. The court has carefully scrutinized SP7's in its entirety, taking into consideration his evidence during examination-in-chief, cross-examination and re-examination, the

court found that SP7's evidence could not have benefited the appellant. SP7's evidence would not help the appellant as he confirmed that he was not aware as to what took place between the Appellant and SP5. The law recognised that a total consistency between witnesses in any case was nearly impossible. Discrepancies were likely to arise due to human fallibility (see paras 15–16).

(3) It is settled law that a conviction based upon uncorroborated evidence is good and safe as they are competent witnesses, but a warning should be given in relying to the uncorroborated evidence of an accomplice. The court has no reason to doubt the finding of the learned trial judge especially when she had the audio visual benefit as to the demeanor of the witness. The learned trial judge ruled that SP5 was indeed an accomplice and had also warned herself as to the danger of convicting the appellant in reliance of evidence by an accomplice. She did not based her decision solely on SP5's evidence but also pointed out that there were other evidence, ie direct and circumstantial, to link the appellant to the offence charge. SP5 was never at any time demonstrated that he was lying and had admitted that there was a pending criminal trial against him. This fact spoke volumes to his credibility. Furthermore, there was no trace of evidence to even suggest that SP5 has motive to lie or to implicate the appellant (see paras 19, 21–22).

(4) The appellant contended that there was a doubt because according to the SP10, the Road Transport Department, Maybank still retained the ownership of the car. This did not affect the prosecution's case (see para 25).

(5) It is trite law that the court hearing the appeal should be slow to disturb the sentence unless it is illegal, or grossly inadequate or manifestly excessive. In this case, the appellant was a legal officer equipped with legal knowledge and skills. He was expected to uphold the law and not to abuse his position. The court reduced the term of imprisonment to eight months, and enhanced the fine to RM20,000 (see para 28).

[Bahasa Malaysia summary

Perayu, seorang pegawai undang-undang di Jabatan Peguam Negara, dipertuduh di bawah s 414 Kanun Keseksaan ('Kanun') bagi kesalahan membantu merahsiakan kereta curi. Secara alternatifnya, dia dipertuduh di bawah s 109 dibaca bersama dengan s 414 Kanun yang sama. Perayu kemudiannya dipertuduh dan disabitkan ke atas pertuduhan utama. Dia dijatuhkan hukuman penjara 12 bulan dan denda sebanyak RM2,000 sekiranya ingkar, penjara tiga bulan. Dalam rayuan ini, perayu menghujah bahawa masa kesalahan tidak dibuktikan dan terdapat percanggahan material antara keterangan saksi, khususnya SP5 dan SP7. Isu lain yang dikemukakan di hadapan mahkamah ialah sama ada adakah ia selamat untuk menyabitkan

perayu berdasarkan keterangan SP5, seorang rakan subahat; sama ada milikan kereta menjadi kepunyaan SP8 dan sama ada hukuman yang dikenakan bersesuaian dengan kesalahan.

Diputuskan, menolak rayuan:

(1) Perayu mendakwa bahawa menurut pertuduhan terpinda, masa kesalahan adalah dari 24 Mac 2006 (11 malam) sehingga 25 Mac 2006 (12.15 pagi) tetapi tiada keterangan dikemukakan untuk membuktikan bahawa satu kesalahan telah berlaku pada waktu dan tarikh tersebut. Mahkamah berpuas hati dengan hujahan bertulis timbalan pendakwa raya yang bijaksana bahawa ia merupakan kerilapan penulisan bona fide. Tambahan pula, keterangan SP5 secara jelas menunjukkan bahawa satu kesalahan berlaku pada 24 Mei 2006 (11 malam) sehingga 25 Jun 2006 (12.15 pagi). Kerilapan perulisan boleh diatasi melalui s 422 Kanun Prosedur Jenayah. Perayu sama sekali tidak diprejudiskan atau mengalami sebarang ketidakadilan (lihat perenggan 8–10 & 12).

(2) Untuk menentukan sama ada terdapat percanggahan sebenar di antara saksi-saksi, keseluruhan keterangan perlu diperiksa. Mahkamah telah menganalisa SP7 secara keseluruhan, mempertimbangkan keterangannya semasa pemeriksaan utama, pemeriksaan balas dan pemeriksaan semula, mahkamah mendapati bahawa keterangan SP7 tidak mendatangkan faedah kepada perayu. Keterangan SP7 tidak dapat membantu perayu memandangkan dia mengesahkan bahawa dia tidak sedar mengenai apa yang berlaku di antara perayu dan SP5. Undang-undang mengakui bahawa keseragaman secara keseluruhan di antara saksi-saksi adalah hampir mustahil. Percanggahan berkemungkinan akan terjadi disebabkan kesilapan manusia (lihat perenggan 15–16).

(3) Ia adalah undang-undang nyata terpakai bahawa sabitan berdasarkan keterangan tanpa sokongan adalah bagus dan selamat memandangkan mereka merupakan saksi-saksi yang kompeten, tetapi satu amaran perlu diberikan apabila bergantung kepada keterangan tanpa sokongan seorang rakan subahat. Mahkamah tidak mempunyai alasan untuk meragui dapatan hakim bicara yang bijaksana terutamanya apabila beliau mempunyai kelebihan audio visual mengenai tingkah laku saksi-saksi. Hakim bicara yang bijaksana memutuskan bahawa SP5 memang merupakan seorang rakan subahat dan juga memberi amaran kepada diri beliau mengenai kebahayaan menyabitkan perayu dengan bergantung kepada keterangan seorang rakan subahat. Beliau tidak membuat keputusan berdasarkan keterangan SP5 semata-mata tetapi juga menunjukkan bahawa terdapat keterangan lain, secara langsung atau mengikut persekitaran, yang mengaitkan perayu dengan kesalahan pertuduhan. SP5 tidak pernah menunjukkan bahawa dia menipu dan

mengakui bahawa terdapat satu perbicaraan jenayah terhadapnya. Fakta ini nyata menunjukkan kredibilitinya. Tambahan pula, tiada sedikitpan keterangan yang mencadangkan bahawa SP5 mempunyai motif untuk menipu atau mengaitkan tertuduh (lihat perenggan 19, 21–22).

(4) Perayu menghujah bahawa terdapat keraguan kerana menurut SP10, Bahagian Pengangkutan Jalan, Maybank masih mengekalkan milikan kereta tersebut. Ini tidak menjejaskan kes pendakwaan (lihat perenggan 25).

(5) Ia adalah undang-undang nyata bahawa mahkamah yang mendengar rayuan seharusnya berhati-hati untuk mencelah mengenai hukuman melainkan hukuman tersebut adalah salah di sisi undang-undang, atau tidak bersesuaian sama sekali atau jelas melampau. Dalam kes ini, perayu merupakan pegawai undang-undang yang mempunyai pengetahuan dan kemahiran-kemahiran undang-undang. Dia diharapkan untuk mendokong undang-undang dan untuk tidak menyalahgunakan kedudukannya. Mahkamah mengurangkan tempoh penjara kepada lapan bulan dan menaikkan denda kepada RM20,000 (lihat perenggan 28).]

Notes

For a case on by intentional aiding, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 12.

Cases referred to

Ho Ming Siang v PP [1966] 1 MLJ 252, FC (refd)
Law Kiat Lang v PP [1966] 1 MLJ 215, FC (refd)
R v Dossi (1918) 13 Cr App Rep 158, CA (refd)
Rattan Singh v PP [1971] 1 MLJ 162 (refd)

Legislation referred to

Criminal Procedure Code ss 153, 162, 422
Evidence Act 1950 s 133
Penal Code ss 109, 414

Yunos bin Shariff (Nor Dalila bt Mohd Zambri with him) (Arman-Yunos) for the appellant.
Ishak Yusuff (Deepa Nair Thevaharan and Nadia bt Izhar with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nurchaya Arshad J:

INTRODUCTION

[1] To begin with, the appellant at the material time was a legal officer

attached at the attorney general's chambers. He was charged with an offence under s 414 of the Penal Code and with an alternative charge under s 109 of the Penal Code read together with s 414 of the same Code. The relevant charges read as follows:

Pertuduhan Pindaan:

> Bahawa kamu antara jam 11.00 malam pada 24.3.2006 hingga jam 12.15 pagi pada 25.3.2006, di termpat letak kereta di Pangsapuri Putra Harmoni, Persint 9, Putrajaya, Wilayah Persekutuan, dengan sengaja telah menolong menghapuskan harta iaitu sebuah kereta BMW model 318i(A) bernombor pendaftaran ADT 6677, nombor enjin 184EI-08677685 dan nombor casis FJ2488 yang kamu ketahui sebagai harta curi, dan oleh yang demikian itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

Pertuduhan alternatif (pindaan):

> Bahawa kamu pada 25.5.2006, jam lebih kurang 5.30 petang, di Pusat Pemeriksaan Bukit Kayu Hitam, dalam Daerah Kubang Pasu, negeri Kedah, Kumaranasu a/l Marimuthu (KP No. RF 142467), dengan sengaja telah menolong menghapuskan harta iaitu sebuah kereta BMW model 318i(A) bernombor pendaftaran ADT 6677, nombor enjin 184EI-08677685 dan nombor casis FJ2488 yang kamu ketahui sebagai harta curi, dan bahawa kamu antara jam 11.00 malam pada 24.3.2006 hingga jam 12.15 pagi pada 25.3.2006, di tempat letak kereta di Pangsapuri Putra Harmoni, Persint 9, Putrajaya, Wilayah Persekutuan, telah bersubahat melakukan kesalahan tersebut telah dilakukan hasil persubahatan kamu dengan menghasut dan melibatkan diri dalam menjual harta curl itu, dan oleh yang demikian itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 414 Kanun Keseksaan.

THE BRIEF FACTS

[2] In February 2003, SP8 had bought a BMW 3 Series bearing the registration number ADT 6677. The said car was insured to Kurnia Insurance (M) Bhd from 2 January 2003 until 1 January 2004.

[3] On 12 August 2003, SP8 accompanied by the appellant, reported that the said car was stolen. Subsequently, SP8 filed a claim with the insurance company. Kurnia Insurance had compensated RM62,000 and the said amount was paid to Maybank, the loan financier.

[4] On 24 May 2006, SP5 was approached by the appellant, and the appellant instructed SP5 to sell a BMW at RM7,000 to a third party in Thailand. SP7 was also present when the meeting took place.

[5] SP5 drove the car and was later detained at Bukit Kayu Hitam Check

Point by SP3. SP3 had made a search through KOMPOL ('Komputer Polis') and discovered the said car had used a fake vehicle registration number RGN 6769. Further investigation revealed that the car was indeed the missing car.

[6] The appellant was later charged and convicted on the principal charge. He was sentenced to 12 months imprisonment, and a fine of RM2,000 in default three months imprisonment.

GROUNDS OF APPEAL

[7] Based upon the petition of appeal, the appellant raised 13 grounds, which could be summarised into the following issues:

(a) whether the particulars as to time of the offence was proved;

(b) whether there are material contradiction between the evidence of SP5 and SP7;

(c) was the conviction safe based upon the evidence of an accomplice ie SP5;

(d) whether the ownership of the car belongs to SP8; and

(e) whether the sentence meted out was proportionate to the offence.

First issue

[8] The appellant claimed that he was convicted on a charge which was not proved by the prosecution. According to the amended charge, the time of the offence was from 24 March 2006 (11pm) until 25 March 2006 (12.15am). However, no evidence was adduced to prove that an offence actually took place at the particular time and date. Therefore, the prosecution's case must necessarily fail.

[9] The learned deputy public prosecutor, in his written submission, contended that it was indeed a bona fide typo error. Furthermore, SP5's evidence clearly showed that an offence actually took place on 24 May 2006 (11pm) until 25 June 2006 (12.15am).

[10] After having perused the appeal record, the court is satisfied that the dates stated in the amended charge (encl B) were indeed bona fide typo errors. After SP5 has testified, the learned deputy public prosecutor made an oral application to amend the charge to insert the following words:

> kamu pada 24.5.2006 antara jam lebih kurang 11.00 malam sehingga 12.15 pagi bertarikh 25.5.2006 (p 469, appeal record).

[11] Having said that, the court also referred to s 153 of the Criminal Procedure Code and the relevant authorities. The cases of *R v Dossi* (1918) 13 Cr App Rep 158, *Law Kiat Lang v Public Prosecutor* [1966] 1 MLJ 215 (FC), *Ho Ming Siang v Public Prosecutor* [1966] 1 MLJ 252 (FC) decided that an error of a date specified in the charge was without importance, unless it is actually an essential part of the offence.

[12] Hence, the above typo error could be cured via s 422 of the Criminal Procedure Code. The appellant had not at all be prejudiced of suffered any injustice. The amendment made was consistent with SP5's evidence. However, the appellant via his counsel decided to waive his right under s 162 of the Criminal Procedure Code by not recalling prosecution's witnesses especially SP5 (appeal record, p 482). Furthermore, there was no dispute in the appellant's evidence in defence, that he met SP5 on those particular dates ie from 24–25 May 2006 (appeal record, pp 497, 512, and 517).

[13] Based upon the above reasons, the first issue raised by the appellant was without merits.

Second issue

[14] Learned counsel also submitted that there are two versions between the evidence of SP5 and SP7. According to SP5, the appellant instructed him to sell the BMW at the price of RM700. However, SP7 revealed that he over-heard the conversation between SP5 and the appellant that SP5 wished to borrow the BMW. Learned counsel submitted that this amounted to a material contradiction and was detrimental to the prosecution's case. According to learned counsel, when there exist two versions, the one which is favourable to the accused should be accepted. Learned counsel submitted that SP7's evidence was consistent with the defence advanced by the appellant that he only intended to lend the BMW to SP5, but not to instruct SP5 to dispose the stolen property.

[15] With all due respect, learned counsel's interpretation of the witnesses' evidence were being taken out of its proper context. To determine whether there were real contradictions among witnesses, the totality of the evidence has to be examined. The court has carefully scrutinised SP7's in its entirety, taking into consideration his evidence during examination-in-chief, cross-examination and re-examination, the court finds that SP7's evidence could not have benefited the appellant. During re-examination, SP7 confirmed that he did not hear any conversation between SP5 and the appellant. SP7's evidence will not help the appellant as he confirmed that he was not aware as to what took place between the appellant and SP5 (appeal record, p 344).

[16] The law recognised that a total consistency between witnesses in any case was nearly impossible. Discrepancies are likely to arise due to human fallibility. Therefore, the second complain mounted by learned counsel is of no merits.

Third issue

[17] Learned counsel also submitted that the conviction was not safe as it was based upon uncorroborated evidence by an accomplice, ie SP5.

[18] Section 133 of the Evidence Act 1950 provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal is not merely because its proceeds upon uncorroborated testimony of an accomplice.

[19] It is settled law that a conviction based upon uncorroborated evidence is good and safe as they are competent witnesses, but a warning should be given in relying to the uncorroborated evidence of an accomplice.

[20] In the case of *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162, the court held that:

> In the current appeal, the learned sessions court judge had rifglty caution herself in dealing with evidence of an accomplice. The learned session judge had conform to the rule of prudent in given warning to herself in dealing with the evidence of an accomplice as evidence in her ground of judgment at pp 698–699.

[21] In this case, the learned trial judge ruled that SP5 was indeed an accomplice. She also warned herself as to the danger of convicting the appellant in reliance of evidence by an accomplice. The court also finds that she did not based her decision solely on SP5's evidence. The learned judge also pointed out that there are other evidence, ie direct and circumstantial, to link the appellant to the offence charge; for example: the learned trial judge noted that correspondence between SP5 and the appellant via SMSs (exh P16A–C).

[22] In this case, SP5 was never at any time demonstrated that he was lying. The court has no reason to doubt the finding of the learned trial judge especially when she had the audio visual benefit as to the demeanor of the witness. In fact, SP5 unhesitantly admitted that there was a pending criminal trial against him. This fact speaks volumes to his credibility. Furthermore, there was no trace of evidence to even suggest that SP5 has motive to lie or to implicate the appellant.

[23] Therefore, this issue is also without merit.

Fourth issue

[24] Learned counsel also contended that the learned trial judge was wrong in finding that Kurnia Insurance now has the ownership of the BMW. According to learned counsel, SP8 is the rightful owner of the car.

[25] The court also finds on merit in this issue. The learned trial judge's finding was consistent with the testimony of SP4 (the agent from the insurance company) and also SP9 (the financier's officer). SP4 testified that after Kurnia Insurance made the payment of RM62,000 to Maybank, the ownership shall be returned to the insurance company (appeal record, p 161). SP9 also confirmed the same fact (appeal record, p 390).

[26] The appellant contended that there was a doubt as to this fact because according to the SP10, the Road Transport Department, Maybank still retains the ownership of the car. The court finds this does not affect the prosecution's case. Both SP4 and SP9 had explained that they had not made the necessarily changes with the Road Transport Department. SP9 further confirms that the bank has no further claims towards the car.

Fifth issue

[27] The appellant contended that the sentence meted out was too harsh.

[28] It is trite law that the court hearing the appeal should be slow to disturb the sentence unless it is illegal, or grossly inadequate or manifestly excessive. In this case, the appellant was a legal officer equip with legal knowledge and skills. He is expected to uphold the law and not to abuse his position. Therefore, the court will reduce the term of imprisonment to eight months, and enhance the fine to RM20,000.

Appeal dismissed.

Reported by Afiq Mohamad Noor